FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

Number 4

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN,

Appellant,

vs.

THE GLIDDEN COMPANY, ET AL.,

Appellees.

BRIEF FOR APPELLEE ON JURISDICTION.

ARTHUR E. NELSON,
EUGENE M. O'NEILL,
1615 Pioneer Building,
St. Paul, Minnesota,
EDWARD L. BOYLE,
712 Lonsdale Building,
Duluth, Minnesota,
Attorneys for Respondents.

INDEX.

	Page.
Motions to dismiss or affirm	1
Statement of Facts	2
Argument on motion to dismiss	3
Argument on motion to affirm	5

CASES CITED.

Abramowitz v. Ins. Co., 170 Minn. 215	7
Blanset v. Carlin, 256 U. S. 319	10
Continental Ins. Co. v. Titcomb, 7 Fed. 2nd 833	3, 8
Davis v. Teague, 74 L. Ed. 1123	6
Enterprise Co. v. Canal Co., 243 U. S. 164	4
Gasser v. Ins. Co., 42 Minn. 315	7
German Ins. Co. v. Lewis, 233 U. S. 389	9
Glidden Co. v. Hardware Co., 230 N. W. 310	2, 3, 8
Hamilton v. Ins. Co., 136 U. S. 242	7, 9
Hamilton v. Ins. Co., 137 U. S. 370	7
Harrington v. Ins. Co., 179 Minn. 510	9
Hodges v. Snyder, 43 Sup. Ct. 435	6
Iron Mt. Co. v. Alexander, 37 Fed. 2nd 231	10
Itasca Paper Co. v. Ins. Co., 175 Minn. 73	3, 4, 7, 8
Ludwig v. Western Union, 216 U. S. 146	4
McCoy v. Shaw, 277 U. S. 302	4
Milheim v. Moffet Dist., 67 L. Ed. 1194	6
Mpls. Soo Road v. Washburn Co., 254 U. S. 370	4
Mpls. Ry. Co. v. Merritt Co., 254 U. S. 376	6
Natl. Ins. Co. v. Wanberg, 260 U. S. 71	9
Orient Ins. Co. v. Skellet, 28 Fed. 2nd 968	3, 8
Red Cross Co. v. Atlantic Co., 264 U. S. 109	7
Roe v. Kansas, 73 L. Ed. 259	6

Scott v. Avery, 5 H. L. Cas. 811 7
Swigart v. Baker, 229 U. S. 187 10
Zucht v. King, 67 L. Ed. 194 6

STATUTES CITED.

General Laws Minnesota, 1895, ch. 175, § 53 6
General Laws Minnesota, 1913, ch. 421 6
Masons Minn. Stat., 1927, § 3512 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

Number 665.

THE HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY OF WISCONSIN,

Appellant,

vs.

THE GLIDDEN COMPANY, ET AL.,

Appellees.

MOTION.

And now come the Respondents in the above entitled action, and respectfully move this Honorable Court for an order:

1. Dismissing the appeal herein on the ground and for the reason that the decision is based upon a non-federal ground which is independent of the federal question decided, and is broad enough to sustain the judgment of the State Court.

2. In the alternative, affirming the judgment of the lower Court on the ground and for the reason that it is manifest that the appeal was taken for delay only, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and, having already been decided by this Court, are res adjudicata and are no longer open questions in this Court.

STATEMENT OF FACTS.

The Siegel Hardware Company sustained a fire loss on March 9, 1929. It was then insured by the Appellant, and by other mutual insurance companies. It subsequently assigned its chose of action to the Respondents.

The parties were unable to agree upon the loss, and proper proceedings for arbitration were instituted by the insured, which resulted in the appointment of an umpire by the State District Court. The appraiser appointed by the insured and the umpire appointed by the Court, after due notice to the Insurance Companies on the risk, made an award of $74,964.91.

The Appellant and the other Companies did not appear or participate in the arbitration proceedings, *but neither did they affirmatively object thereto.*

Thereafter suit was commenced to recover upon the award. Verdict and judgment was given and rendered to the Respondents. Appeal was thereupon perfected, and the Supreme Court of the State of Minnesota upheld the award and the constitutionality of the statute on which it was predicated.

Glidden Co. v. Hardware Co., 233 N. W. 310.

This appeal is from the final judgment so rendered by the Supreme Court of Minnesota.

There are three companies upon the risk, i. e. The Hardware Dealers Mutual Fire Insurance Company of Wisconsin, Retail Hardware Mutual Fire Insurance Company of Minnesota, and the Minnesota Implement Fire Insurance Company of Minnesota. The last two companies are Minnesota corporations. The immediate Appellant is a Wisconsin corporation, authorized to and actually transacting business in Minnesota.

ARGUMENT.

FIRST

DISMISSAL OF APPEAL.

The decision of the Minnesota Supreme Court is based upon two grounds, one federal and the other non-federal. The non-federal ground of the decision is that a policy like the one here involved, with a provision for a board of appraisal, is a contract voluntarily made by the parties, notwithstanding the form is prescribed by the statute. This is the law of the State as established by the Supreme Court of Minnesota in

Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73.

The United States Circuit Court of Appeals of the Eighth Circuit has also adopted this position:

Continental Ins. Co. v. Titcomb, 7 Fed. 2nd 833.

Orient Ins. Co. v. Skellet, 28 Fed. 2nd 968.

The decision in the Itasca Paper Company case, supra, is made the basis of the decision by the Court in the case at bar, where the Court said:

"It is conceded substantially that the recent case of Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73, 220 N. W. 425, if applied, controls. The defendants urge that certain late federal cases have changed the doctrine there approved. They ask a reconsideration of the questions involved with the purpose, if unsuccessful here, of having a review in the court of final authority. After a thorough reconsideration, we follow the Itasca case. An extended further discussion is not necessary."

Glidden Co. v. Hardware Co., 233 N. W. 310.

This non-federal ground for the decision is independent of the federal ground, and is broad enough to sustain the decision. The judgment, then, does not depend on the decision of any federal question, even though such federal question was also decided.

Accordingly the appeal should be dismissed.

Enterprise Irrigation Co. v. Canal Co., 243 U. S. 157, 164.

This non-federal ground is based upon fair and substantial support, and shows on its face that it is not advanced to escape a review of the federal question. The non-federal question is independent of the federal question, and is broad enough to sustain the decision, and it shows conclusively that it is not essentially arbitrary, or a mere device to prevent review.

McCoy v. Shaw, 277 U. S. 302.

The history of this legislation covering this compulsory arbitration, and the long continued acquiescence therein by the Insurance Companies, as hereinafter recited, furnishes a far stronger argument for the voluntary nature of this contract than did the freight schedules involved in the following case:

Mpls. S. Paul & Sault Ste. Marie Ry. Co. v. Washburn Co., 254 U. S. 370.

Nor is the voluntary nature of this contract destroyed by the compulsory arbitration provision of the statute, as the Appellant, as hereinafter set forth, was not compelled to observe an unconstitutional law but had ample means at its disposal to protect its interests in the manner hereinafter set forth.

Itasca Paper Co. v. Niagara Fire Ins. Co., supra.

Ludwig v. Western Union Tel. Co., 216 U. S. 146.

The following language in the case of

Mpls. Ry., etc., Co. v. Washburn Co., supra,

is peculiarly appropriate and applicable to the present situation:

> "Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement of such publication becomes a mere trap for the unwary."

It is fair to assume that these companies have solicited business and taken large amounts of money as premiums from Minnesota citizens under contracts whereby these citizens had every right to, and did believe that they were entitled to arbitrate their losses, if they saw fit so to do, and it is not unfair to assume that, when these companies solicited business, and submitted their policy contracts to their insured, the latter had every right to believe that these contracts, prepared and submitted by the companies, meant exactly what they said.

If the arbitration clause was as objectionable to the Insurance Companies as they now profess it to be, they could have raised the question of its constitutionality long ago by a test case, or by refusing to comply with the Act, and then restraining the State officials from revoking their license, or by other means not involving the penalizing of their own insured, with whom they had contracted for arbitration, and from whom they had taken money in reliance thereon.

SECOND.

Affirmance of Judgment.

Respondents respectfully contend that if the appeal be not dismissed the judgment should be affirmed, because the constitutional question presented is not, and was not at the time of the granting of the writ, substantial in character, and the question has been settled and is no longer an open one in this Court.

Such a situation justifies an affirmance.

Zucht v. King, 67 L. Ed. 194.

Milheim v. Moffat Dist. 67 L. Ed. 1194.

Roe v. Kansas, 73 L. Ed. 259.

Davis v. Teague, 74 L. Ed. 1123.

Hodges v. Snyder, 43 Sup. Ct. 435.

Mpls. &c. Ry. Co. v. Merritt Co., 254 U. S. 376.

Legislation establishing the statutory form of fire insurance policies in Minnesota, and containing the arbitration clause, was originally enacted in 1895.

Minnesota Gen. Laws 1895, Chap. 175, Sec. 53.

Therein it provided, amongst other things:

> "The award * * * shall be conclusive and final upon the parties as to the amount of loss or damage * * * and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

This "arbitration provision" was carried forward, with an unimportant change of a word, until 1913, when the present law was enacted.

Gen. Laws 1913, Chap. 421.

Mason's Minnesota Statutes 1927, Sec. 3512.

This standard form, of course, is applicable, not only to foreign insurance companies, but to domestic companies as well. There is no discrimination and no denial of the equal protection of the laws.

It is interesting to note that prior to 1913, the arbitration was compulsory, so far as the insured was concerned. If demanded and not complied with, the insured was remedyless.

Furthermore, the award "was conclusive and final upon the parties as to the amount of loss and damage."

The amendment was made so as to give equal rights to both the insured and the insurer.

The companies contented themselves with complying with this provision and taking advantage thereof, without any objection or criticism, until 1927,

Abramowitz v. Ins. Co., 170 Minn. 215.

In 1928, so far as we can ascertain, the law was first directly attacked as unconstitutional.

Itasca Co. v. Ins. Co., 175 Minn. 73.

The Companies here involved continued to operate without objection until the instant case, nor did they AFFIRMATIVELY object to the arbitration until a sizable award proved to be the result thereof.

The gravamen of the objection to the statute, as raised by the Appellant, is that it denies the right of ordinary redress in the courts and is therefore unconstitutional (see page 6 of Appellant's brief).

That the argument of deprivation of redress in the courts is unsound has been determined by this Court, and is res adjudicata,

Hamilton v. Ins. Co., 136 U. S. 242; 34 L. Ed. 419.

Hamilton v. Ins. Co., 137 U. S. 370.

Red Cross Co. v. Atlantic Co., 264 U. S. 109; 68 L. Ed. 582.

This doctrine has been established since 1856.

Scott v. Avery, 5 H. L. Cases 811,

and as early as 1890 in Minnesota.

Gasser v. Ins. Co., 42 Minn. 315.

It has been uniformly upheld in the higher courts of England, Canada and the United States, and has thus become settled law in these countries, upon which the citizens thereof have a right to rely.

The provision of arbitration of insurance losses was in common use in policies voluntarily entered into many years before arbitration was embodied in statutory form. Statutory provisions compelling arbitration by one or both of the contracting parties are merely declaratory of what had become established usage and custom.

Many, if not most of the states have adopted a standard form of policy, incorporating therein compulsory arbitration in one form or another. The fact that arbitration is made compulsory as to the insured, by making it a condition precedent to recovery under the policy, could not make the statute less objectionable than it would be where arbitration is compelled as to both parties, as in Minnesota.

Incidentally, the United States Circuit Court of Appeals of the Eighth Circuit has upheld the Minnesota Statute.

Continental Ins. Co. v. Titcomb, 7 Fed. 2nd 833.
Orient Ins. Co. v. Skellet, 28 Fed. 2nd 968.

The Minnesota Supreme Court has held that the arbitration provision of the statute does not oust the jurisdiction of the Court.

Abramowitz v. Ins. Co., 170 Minn. 215.
Itasca Co. v. Ins. Co., 175 Minn. 73.
Glidden Co. v. Ins. Co., 233 N. W. 310.

The award itself, as distinguished from defenses other than amount of loss, may be set aside for fraud, lack of proper notice of hearing by the appraisers, etc., and it may be so grossly

excessive or inadequate as to be subject to revocation as for fraud THOUGH THERE BE NO ACTUAL FRAUD.

Harrington v. Ins. Co., 179 Minn. 510.

These decisions give the Appellant the right of asserting any defense in Court, except the question of amount of loss, and even in that particular it is not entirely foreclosed.

This Court has held on many occasions that the business of insurance is affected with a public interest, and by reason thereof must yield to public regulation.

German Ins. Co. v. Lewis, 233 U. S. 389, 58 L. Ed. 1011.

National Union Ins. Co. v. Wanberg, 260 U. S. 71, 67 L. Ed. 136.

Also, that the states have a right to prescribe standard forms of fire insurance policies, as being a valid exercise of their police power.

German Ins. Co. v. Lewis (supra).

We earnestly contend that the basic question involved has already been decided by this Court against the Appellant's contentions (Hamilton v. Ins. Co., supra) and that it is therefore res adjudicata, and accordingly that the appeal does not involve a substantial question.

The Hamilton case is decisive of the question because, although the contract there involved was not compulsory as to the insurance company, *it was compulsory as to the insured*, and he was the one who was attacking it and claiming its invalidity. This Court held that the compulsory arbitration, so far as the plaintiff was concerned, was a valid provision. It then would be eqully vald if compulsory as to both parties.

The following language of this Court leaves no vestige of doubt in the matter.

"Such a stipulation not ousting the jurisdiction of the Court * * * is unquestionably valid."

The Appellant's claim is that the Act is unconstitutional because it "denies them the right of ordinary redress in the Courts".

THIS COURT HOLDS OTHERWISE.

If a voluntary contract of arbitration is valid, and does not deprive the contracting parties of their property without due process of law, upon what theory is a statute void which compels such a contract when the general right of a state legislature to prescribe a standard form is admitted?

In closing, we submit that the fact that the statute has been applied and has been incorporated in thousands of policies, under which policyholders have paid thousand of dollars for a long period, should have a strong bearing upon determining the validity of the statute.

Swigart v. Baker, 229 U. S. 187, 57 L. Ed. 1143.
Blanset v. Cardin, 256 U. S. 319, 65 L. Ed. 950.
Iron Mt. Co. v. Alexander, 37 Fed. 2nd, 231.

Respectfully submitted,

ARTHUR E. NELSON,
EUGENE M. O'NEILL,
1615 Pioneer Building,
St. Paul, Minnesota,
EDWARD L. BOYLE,
712 Lonsdale Building,
Duluth, Minnesota,
Attorneys for Respondents.

